86-1565

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THOMAS E. BAUER, Petitioner

v.

FREEMAN (TEEK) BOSLEY, Jr., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS E. BAUER
4647 Hampton Ave., Suite 301
St. Louis, MO 63109
(314) 481-2886

Counsel of Record

QUESTIONS PRESENTED

1. Whether the Eighth Circuit's failure to apply the two-prong Branti test to its analysis and its creation of an attorney exception to First Amendment protection conflicts with decisions of this Court.

2. Whether the decision of the Eighth Circuit setting aside the jury's verdict violated petitioner's right to a jury trial since the facts in dispute were ones from which fair-minded men could draw different inferences.

3. Whether the Eighth Circuit erred in affirming the district court's J.N.O.V. as to the damages award since Clerk Bosley had actual knowledge that his conduct was violative of plaintiff's Constitutional Rights; hence, whether the Harlow qualified immunity doctrine was applicable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CONSTITUTIONAL PROVISIONS

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1986

THOMAS E. BAUER, Petitioner,

v.

FREEMAN (TEEK) BOSLEY, Jr., Clerk of the Circuit Court, City of St. Louis, and PAULA CARTER, Deputy Circuit Clerk, City of St. Louis, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Thomas E. Bauer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on December 30, 1986, the date on which rehearing en banc was denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 802 F.2d 1058 (8th Cir. 1986), and is reprinted in the appendix hereto, p. A-1, infra.

The Eighth Circuit Court of Appeals Order, denying petition for rehearing en banc, is reprinted in the appendix hereto, p. A-56, infra.

The decision of the District Court is reprinted in the appendix hereto, p. A-57, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. s 1983, 1985, 1986, and 1988, the petitioner brought this suit in the Eastern District of Missouri. On respondents' appeal, the Eighth Circuit entered judgment and opinion reversing

the Eastern District's order of reinstatement. The order denying Petition for Rehearing En Banc was entered on December 30, 1986.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. s 1254(1).

STATUTE CONFERRING JURISDICTION

28 U.S.C. s 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil case after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONSTITUTION AMENDMENT I

Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONSTITUTION AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. s 1983

Every person who, under color of

any statute, ordinance, regulation custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, an attorney, in a 42 U.S.C. s 1983 action, in the Eastern District of Missouri, prayed for civil damages, and for declaratory injunctive relief against Freeman Bosley, Clerk of the Circuit Court of the City of St. Louis, and also an attorney, and his Chief Deputy, Paula Carter. The position

of Circuit Clerk is an elective office. In the 1982 elections, plaintiff actively supported the then-incumbent Circuit Clerk, Joseph Roddy, who was defeated by Respondent Bosley in the Democratic primary election. Petitioner was terminated from his position of Staff Legal Assistant II in the Circuit Clerk's office on January 4, 1983, four days after Bosley took office. Petitioner alleged, and the jury found, that Respondent Bosley, in conspiracy with Respondent Carter, had terminated petitioner from that position by reason of petitioner's support for Bosley's election opponent.

Following a four day trial, the jury found in favor of plaintiff on the contested fact issues, awarded actual damages in the amount of $58,000 in favor of plaintiff and against both defendants,

and awarded $6,000 in punitive damages against defendant Bosley. Plaintiff then moved for declaratory judgment adjudicating that Bosley had violated his rights under the first amendment; for an order of reinstatement, or alternatively, an award of front pay; and for his reasonable attorneys' fees pursuant to 42 U.S.C. s 1988. Defendants filed a motion for judgment notwithstanding the verdict.

On August 28, 1985, the District Court entered its final order and judgment. The District Court granted the requested declaratory and injunctive relief. The District Court also granted, in part, defendant's motion for judgment notwithstanding the verdict. Specifically, the District Court found that the defense of qualified or good faith immunity from personal liability for damages was applicable to the instant

case. The District Court reasoned that the constitutional protection afforded to the position of Staff Legal Assistant II had not been clearly established by law at the time of plaintiff's discharge, and hence, plaintiff could not recover damages from them.

Both petitioner and respondents filed appeals and cross-appeals to the Eighth Circuit Court of Appeals. The Circuit panel filed its opinion on October 8, 1986.

In the opinion by Floyd R. Gibson, Senior Circuit Judge, joined in by Circuit Judge Fagg, the Eighth Circuit held in this political discrimination action brought under 42 U.S.C. s 1983:

a) after a review of the record below the Court determined that it did not agree with the jury finding that political affiliation was not an

appropriate requirement for the effective performance of the duties of Staff Legal Assistant II. The Court substituted its own findings on the facts for that of the jury without applying the standard clearly erroneous test for setting aside a jury's findings of fact.

b) that the finding of appropriateness of political affiliation was dispositive of all the issues on appeal. The Court affirmed the District Court's Judgment Notwithstanding the Verdict as to the damage award and reversed the trial Judge's Order which found Bauer's Constitutional rights had been violated and which had ordered him reinstated.

Circuit Judge Heaney dissented saying essentially that the dismissal was politically motivated and that this was a clear plaintiff's case as regards the

issue of appropriateness of political affiliation. Judge Heaney would have set aside the Judgment Notwithstanding the Verdict (thus, affirming the jury's damages award) and would have affirmed the Order of Reinstatement. Judge Heaney would have set aside the Judgment Notwithstanding the Verdict because Respondents did not have qualified immunity since "Bosley fired Bauer in the face of a proposed Order of the St. Louis Circuit Court sitting en banc prohibiting such action," "Bosley knew of the Elrod (Elrod v. Burns, 427 U.S. 369 (1976)) and Branti cases at the time he fired Bauer and Bosley knew he could not constitutionally fire Bauer for political reasons but did so in spite of such law." (A-54,55).

Petitioner filed his timely petition for rehearing en banc. That

petition was denied on December 30, 1986. Circuit Judges Heaney and McMillian would have granted the petition.

REASONS FOR GRANTING WRIT

I.

THE EIGHTH CIRCUIT'S FAILURE TO APPLY THE TWO-PRONG BRANTI TEST TO ITS ANALYSIS AND ITS CREATION OF AN ATTORNEY EXCEPTION TO FIRST AMENDMENT PROTECTION CONFLICTS WITH DECISIONS OF THIS COURT.

Assuming arguendo that there was an attorney-client relationship between Petitioner and Clerk Bosley, the principle defect in the Eighth Circuit's Opinion is its failure to apply the two-prong analysis dictated by Branti v. Finkel, 445 U.S. 507, 519 (1980) to its findings of fact on the issue of whether political affiliation is an appropriate requirement for the effective performance of Petitioner's position, SLA II.

The two-prong test requires that:

1) If the employee is a policymaker, the policy he makes may not relate to any partisan political interests; and

2) If the employee has access to confidential information arising out of an attorney-client relationship, that the information have no bearing whatsoever on partisan political concerns.

The Eighth Circuit determined "that the Staff Legal Assistant II position is exactly the sort of position for which political affiliation is an appropriate requirement for effective performance." (A-24,25). If the Eighth Circuit had applied the two-prong Branti test it could not have reached that determination. The Eighth Circuit based its "holding in large part on the testimony adduced at trial from Bauer's predecessors and successors in the SLA II

position." (A-22). They testified that "they shared an attorney-client relationship with the Circuit Clerk" and that "they were responsible for advising the Circuit Clerk as to his official duties." (A-23). Petitioner testified "that he advised the Clerk as to compliance with statutes governing office procedures, and explained to Bosley his role as Clerk at the circuit judges en banc meeting." (A-23,24). Successors Edwards and Cahill stated that "they represented the Circuit Clerk in various matters, including contract negotiations, and judicial and administrative proceedings." (A-24). The court articulated three reasons for reaching its determination that political affiliation was an appropriate requirement:

(1) The SLA II is the only position in

the office that must be filled by an attorney;

(2) The SLA II renders legal advice to the Clerk and represents the Clerk; and

(3) The Clerk is entitled to appoint an attorney in whom he can repose his trust and confidence.

The Court's sole reason for basing its finding that Clerk Bosley had no trust or confidence in Petitioner was based on Mr. Bosley's testimony that "as a result of the incidents of January 3, his confidence and trust in Bauer and Bauer's loyalty to him were so shaken that he decided it would be in the best interest of the Clerk's Office to hire another attorney." (A- 7). The January 3 incident refers to advice Petitioner had given the Clerk to obey an order of the Circuit Court en banc which sought to "prohibit Bosley from discharging any

employees..." (A- 7). Indeed, in Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984), cert. denied, 105 S.Ct. 2022 (1985), the companion case, the Eighth Circuit found that the three other deputy clerks discharged on the same day as Petitioner had been discharged solely for political reasons, and that their positions were not ones for which political affiliation was an appropriate requirement. Petitioner's advice to Clerk Bosley, regarding compliance with the Court en banc's Order, was competent; Clerk Bosley's quandary with Petitioner's advice in truth did not relate to "shaken confidence" but to a refusal on Clerk Bosley's part to obey the law; any reasonable office-holder, particularly an attorney, would have abstained from any firings in light of the Court en banc's order.

None of the testimony adduced at trial upon which the Circuit Court based its "holding in large part" (A-22) satisfies either of the two prongs of the Branti test. An examination of that testimony indicates that:

(1) Any policy which Petitioner could, by virtue of the SLA II position, have made would, necessarily, relate soley to the interpretation and implementation of statutes and rules of court. As an attorney, and as a sworn officer of the court, Petitioner was charged with a duty to impartially enforce and obey the statutes and rules. Petitioner would violate his public trust were he to permit partisan political concerns to influence any policy he might make. To permit partisan political concerns to influence these types of policy decisions, i.e. to make the SLA II

position one for which political affiliation is appropriate, "would undermine, rather than promote, the effective performance of" the Clerk's Office. Branti at 519-520.

(2) Confidential information arising out of the attorney-client relationship could have no bearing whatsoever on partisan political concerns because the representation relates solely to the operation of a public office whose function and purpose are rigidly controlled by rules promulgated by the Missouri Supreme Court and statutes enacted by the Missouri Legislature. "The Clerk of the Circuit Court [of the City of St. Louis] is an administrative officer whose functions are largely ministerial in character, State v. Priest, 152 S.W. 2d 109 (Mo. 1941); as such, he is charged with a duty to

enforce and implement rules and statutes. Litigation to which the Clerk is a party as clerk has no bearing on partisan political concerns because the scope and function of his office is rigidly controlled by rules of court and statutes.

In Meeks v. Grimes, 779 F.2d 417, 421 (7th Cir. 1985), a case involving bailiffs with access to confidential information, the court stated:

> These bailiffs are duty-bound to protect the sanctity of the court, and, while political affiliation may be an acceptable priority for loyalty, trust, and maybe even efficiency, it would cast the net of the Elrod exception too wide to allow political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts.

Mr. Edwards, petitioner's successor, and Clerk Bosley's own witness, best articulated the apolitical

nature of petitioner's job when he testified:

> Q. Hypothetically, if a person was a legal advisor and he was in a different political party than the clerk, could he harm or hamper the clerk?
>
> A. I don't think that that really has anything to do with it. My job was to handle the legal questions and the legal questions are very, very clear, the interpretations of the laws of the state of Missouri. I don't think that politics has anything to do with it.
>
> * * * *
>
> Q. If I understand your earlier testimony correctly, you think that particular party affiliation really doesn't matter to the appointment process to the legal advisor. That he is getting somebody who is competent to do the job. Is that right?
>
> A. Definitely true. (A-47).

The Eighth Circuit has constructed an exception to the rule in Branti solely

because Petitioner is an attorney. It has refused to apply the two-prong test because "the SLA II is the only position in the Circuit Clerk's Office that must be filled by an attorney licensed by the State of Missouri" and that "[b]ecause the responsibilities of the SLA II emcompass the rendering of legal advice to, and legal representation of the Circuit Clerk, the Clerk is entitled to appoint to the position an attorney in whom he can repose his trust and confidence." (A- 25).

The Eighth Circuit has created a confusing precedent, likely to generate even further confusion among the other Circuits. The holding poses the obvious danger that attorneys who are fired for political reasons might not be afforded their legitimate, specifically-articulated rights under Branti v.

Finkel. The Eighth Circuit presents a precedent directly at odds with this Court's ruling in Branti. Plenary consideration of the matter by this Court is essential.

II.

THE DECISION OF THE EIGHTH CIRCUIT SETTING ASIDE THE JURY'S VERDICT VIOLATED PETITIONER'S RIGHT TO A JURY TRIAL BECAUSE THE FACTS IN DISPUTE WERE ONES FROM WHICH FAIR-MINDED MEN COULD DRAW DIFFERENT INFERENCES.

In Wilkerson v. McCarthy, et al., Trustees, 336 U.S. 53 (1949), this Court articulated the standard for determining whether the decision of a lower court to withhold a case from the jury or setting aside a jury's verdict impinged upon a plaintiff's right to a jury trial. Wilkerson was a F.E.L.A. case. In

Wilkerson, this Court reviewed a Utah Supreme Court decision which had upheld a trial court order directing a jury to return a verdict in favor of the railroad. This Court state the following regarding the Utah Supreme Court decision:

> [The Utah decision] rested on that court's independent resolution of conflicting testimony. This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues...
> It was because of the importance of preserving...the right to a jury trial that we granted certiorari in this case...It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given... It was only as a result of its inappropriate

> resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict... [S]ince there was evidence to support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to direct a verdict in favor of respondents..."We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."...And peremptory instructions should not be given in negligence cases "where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences..." Such has ever since been the established rule for trial and appellate courts.

In the instant jury case, as in Wilkerson, an appellate court substituted its findings for those of the jury. The action of the court was improper because the evidence before the jury was such

that they might have found either way on the question of "appropriateness of political affiliation." The strength of the evidence favoring the jury's determination is indicated by: 1) the failure of the trial judge to direct a verdict, 2) the adoption by the trial court of the jury's finding in granting declaratory and injunctive relief (A-66), and 3) by the dissent of Circuit Judge Heaney in the Eighth Circuit's opinion. (A-38).

It is clear that the trial judge, Judge Hungate, and Circuit Judge Heaney believed that "reasonable inferences supported the jury determination." Both judges determined independently that they were in agreement with the jury determination. Indeed, even the majority, by failing to apply the clearly erroneous standard (A-20 - A-22) in order

to set aside the jury determination, has indicated that there was sufficient evidence to support the finding.

The instant appellate decision, in its denial of petitioner's right to a jury determination, has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

III.

THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S J.N.O.V. AS TO THE DAMAGES AWARD BECAUSE CLERK BOSLEY HAD ACTUAL KNOWLEDGE THAT HIS CONDUCT WAS VIOLATIVE OF PLAINTIFF'S CONSTITUTIONAL RIGHTS; THUS, THE HARLOW QUALIFIED IMMUNITY DOCTRINE WAS NOT APPLICABLE.

The decision of the Eighth Circuit affirming the district court's grant of judgment notwithstanding the verdict as to the damage award (A-35) leaves

standing an erroneous order of the district court.

The district court found that respondents were protected from civil liability by the qualified immunity doctrine. Qualified immunity is an affirmative defense which respondents failed to adequately raise at trial; thus, this defense was waived. Creamer v. Porter, 754 F.2d 1311, 1317 (8th Cir. 1985).

Even if Respondents had properly raised the qualified immunity defense enunciated by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), it would have been error to set aside the damages award. As Circuit Judge Heaney stated in this case, " Bosley knew of the Elrod and Branti cases at the time he fired Bauer and ...Bosley knew he could not constitutionally fire Bauer for political

reasons but did so in spite of such law." Additionally, "Bosley fired Bauer in the face of a proposed court order of the St. Louis Circuit Court sitting en banc prohibiting such action." (A-54, 55).

As even Judge Hungate acknowledges, "[T]he jury, by its award of punitive damages made a finding of bad faith as to defendant Bosley." (A-63).

In spite of the foregoing, both the District Court and the Eighth Circuit have refused to apply the rule in Harlow which permits the shielding of defendants from civil liability only when "their conduct does not violate clearly established...constitutional rights of which a reasonable person would have known." Id. at 818. In the instant case, Clerk Bosley, an attorney, had actual knowledge that his conduct was violative of Petitioner's rights; thus,

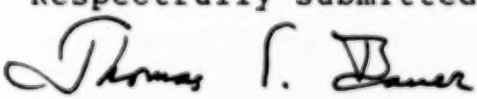
the protection of Harlow is not available to Clerk Bosley.

This holding has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,



THOMAS E. BAUER
4647 Hampton Ave., Suite 301
St. Louis, MO 63109
(314) 481-2886
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2186

Thomas E. Bauer, *

*

Appellant, *

*

v. *

*

Freeman Bosley, Jr., and *
Paula Carter, *

*

Appellees. *

Appeals from the
United States District Court
for the Eastern District of Missouri

No. 85-2187

Thomas E. Bauer, *

*

Appellee, *

*

v. *

*

Freeman Bosley, Jr., and *
Paula Carter, *

*

Appellants. *

Submitted: March 13, 1986

Filed: October 8, 1986

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Thomas E. Bauer, former Staff Legal Assistant in the Office of the Clerk of the Circuit Court of the City of St. Louis, brought this action under 42 U.S.C. s 1983 alleging that the defendants, Freeman Bosley, Jr. and Paula Carter, terminated his employment for political reasons in violation of his First, Fifth and Fourteenth Amendment rights. Bauer asserted that Bosley, the present Circuit Clerk, and Carter, his Chief Deputy, conspired to terminate Bauer for Bauer's support of the previous Circuit Clerk, whom Bosley defeated in the Democratic primary election. The

jury returned a verdict of actual damages against Bosley and Carter, and punitive damages against Bosley. The district court found that the defendants were entitled to qualified immunity, and granted their motion for judgment notwithstanding the verdict as to the jury's award of actual and punitive damages. The court, however, ordered that Bauer be reinstated to his position. Bauer argues on appeal that the defendants were not entitled to qualified immunity and therefore the damage awards against the defendants should be reinstated. Bosley and Carter argue on their cross appeal that the court erred in restoring Bauer to his former position because the evidence was insufficient to establish that his dismissal was politically motivated, and the position itself is one for which a politically

motivated dismissal would have been appropriate. We affirm the district court's grant of judgment notwithstanding the verdict as to the damage award, but reverse the court's order that Bauer be reinstated to his former position.

I. BACKGROUND

Thomas Bauer was appointed to the position of Staff Legal Assistant II (SLA II) on January 4, 1982, by then Circuit Clerk Joseph Roddy. In the City of St. Louis the Circuit Clerk's Office is an elected position. Bauer supported Roddy in the Democratic primary election in August 1982, which Roddy lost to Bosley. Bosley then won the general election in November 1982, and took office on January 1, 1983. On January 3, Bauer met with Bosley to discuss his job. Bosley asked Bauer whether he perceived any problems in the Clerk's Office, and requested that

Bauer submit to Bosley a resume of his background.

Later on the afternoon of January 3, Bauer and Bosley attended a meeting of the general term of the St. Louis Circuit Court, at which all the judges meet to set court policy. Bauer testified that he met with Bosley before the meeting to explain to Bosley what his duties were at that meeting. When the judges went into executive session, Bauer waited outside to get the notes of that session to give to Bosley. Bauer proceeded with notes in hand to Bosley's office, where two reporters were waiting. Before Bauer could give Bosley the executive session notes, the reporters began to question Bosley as to how he intended to respond to a purported order issued by the judges in the executive session. Bosley then asked Bauer to accompany him to his

office to discuss the court's action. Once inside his office, Bosley asked Bauer, "You're my lawyer, give me advice. What should I tell them on this matter ?" Bauer testified that he responded: "I'm sorry, Mr. Bosley, but I don't think that we can have an attorney-client relationship and I'm not your lawyer as regards any kind of a controversy you have between yourself and the court. And I couldn't be your lawyer as to a controversy between yourself and the court because I would be serving two masters, because I work for the court and for the clerk * * * * I can't give you advice on this matter." When pressed by Bosley as to what he should do, Bauer told Bosley that an order had been issued by the circuit court and that "he had to obey it."

The "order" to which Bauer

referred concerned a vote taken by the en banc court to prohibit Bosley from discharging any employees until the circuit court could file a declaratory judgment action with the Missouri Supreme Court to clarify Bosley's hiring and firing powers. Although the vote was taken on January 3, the court did not issue a formal order on that prohibition until January 6; later, the court withdrew the order. On reading the session minutes Bosley disagreed with Bauer that an order had actually been entered. Bosley testified that as a result of the incidents of January 3, his confidence and trust in Bauer and Bauer's loyalty to him were so shaken that he decided it would be in the best interest of the Clerk's Office to hire another attorney. After discussing the matter with six other attorneys, Bosley decided

to terminate Bauer. Bosley gave the termination letter to Paula Carter to deliver to Bauer on January 4. Bauer testified that on handing him the letter Carter said to him, "I've been waiting a long time to give you this"; Carter testified, however, that she made no such statement and had not known the contents of the sealed letter.[1]

Much testimony was offered at trial concerning the nature of the SLA II position, from which Bauer was discharged. Bosley testified that the SLA II was basically "the clerk's

---

[1] Other testimony at trial indicated that Bosley had decided to replace Bauer as of December 28, 1982, and that he had written Judge Gaertner of the circuit court for waiver of a policy requiring Bauer's position to remain vacant after his termination until his accrued annual leave had been exhausted.

lawyer," appointed by the Circuit Clerk and paid through his personnel budget, whose duties include advising the Clerk on office policies and procedures, political matters, and personnel questions, and representing the Clerk in contract negotiations, meetings with the judges, judicial proceedings, and judicial finance hearings. Bosley characterized the relationship between the SLA II and the Clerk as one between an attorney and his client. Likewise, Julian Bush, who occupied the SLA II position from 1877 to 1981 under former clerk Roddy, testified that he was appointed by and had an attorney-client relationship with the Clerk, who directed him in his duties. Bush stated that in any dispute between the circuit court judges and the Circuit Clerk over their respective powers, he would take the

Clerk's side, as he did not work for the judges but for the Clerk. Bush added that it was his responsibility "to advise the clerk with respect to his legal obligations and his legal rights."

Bauer's replacement in the SLA II position, Jimmie Edwards, testified at trial that he was appointed by Bosley to that office, and reported to and was under the direction of Bosley. Edwards stated that an attorney-client relationship existed between him and Bosley, and that he represented Bosley in cases before the state supreme court administrative judicial panel and in prisoner cases in federal district court. Further, Edwards testified that he developed personnel policy, and negotiated contracts on behalf of the Circuit Clerk. Clyde Cahill, Jr., who took over the SLA II position in November

1984, testified that he was hired by the Circuit Clerk and that any work he performed with the circuit judges was on behalf of the Clerk. Cahill stated, as did Edwards, that he worked 100 percent for Bosley, and that an attorney-client relationship existed between them. Cahill testified that among his responsibilities were advising Bosley as to personnel matters and Bosley's official duties as Clerk, and representing Bosley in administrative proceedings and in court. Additionally, Thomas Connelly, who was once a candidate for the Circuit Clerk's Office, testified that he understood the SLA II position to be the appointment of the Circuit Clerk and that an attorney-client relationship existed between them.

Bauer stated at trial that the Circuit Clerk had no authority to hire

him without approval of the presiding circuit judge, and that therefore he was given the job by then presiding Judge Corcoran, and Mr. Roddy. Bauer testified that among his duties as SLA II were advising the Circuit Clerk on complying with statutes governing office procedures, as well as on personnel matters.

Bauer filed this action in December 1983 seeking declaratory and injunctive relief as well as actual and punitive damages against Bosley and Carter. Bauer alleged that Bosley and Carter conspired with one another to violate the dictates of Elrod v. Burns, 427 U.S. 347 (1976). and Branti v. Finkel, 445 U.S. 507 (1980) by terminating him from a nonpolicymaking, nonconfidential position because of his support for Bosley's political opponent,

Joseph Roddy. The jury awarded Bauer actual damages of $58,000.00 against both Bosley and Carter, and punitive damages of $6,000.00 against Bosley. Bosley and Carter filed both a motion for new trial and a motion for judgment notwithstanding the verdict, while Bauer moved the court for the equitable relief of either reinstatement or front pay. In its memorandum and order entered August 28, 1985 the district court granted in part the defendants' motion for judgment notwithstanding the verdict, finding that they were entitled to qualified immunity from personal liability for damages under Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Davis v. Scherer, 104 S.Ct. 3012, 3018-19 (1984). The district court also entered an award of declaratory and injunctive relief in favor of plaintiff Bauer, based on the jury's finding that

the defendants violated Bauer's First Amendment rights. The court entered judgment declaring that Bauer's rights under the Constitution had been violated by defendants and ordered that Bauer be reinstated to his position as SLA II.

Bauer filed this appeal from the district court's order, assting that the court erred in granting the defendants qualified immunity. Bauer argues first that qualified immunity is an affirmative defense, which the defendants failed to plead and thereby waived; and second, that he made a submissible case that the defendants had actual knowledge that their conduct violated Bauer's First Amendment rights, thus rendering the qualified immunity defense unavailable to them. Bosley and Carter filed a cross appeal with this court, contending that the district court

erred in reinstating Bauer to his prior position because the evidence was insufficient to establish that his dismissal was politically motivated, and because the position itself is one for which a politically motivated dismissal would have been appropriate. We agree with Bosley and Carter that the SLA II position is one for which a politically or personally motivated dismissal would have been appropriate, and therefore reverse the district court's reinstatement of Bauer on that basis.

II. DISCUSSION

The right that Bauer asserts in this case, the freedom enjoyed by a public employee from dismissal for political reasons, was first articulated by the Supreme Court in Elrod v. Burns, 427 U.S. 347 (1976) (plurality), which

concerned the dismissal of deputy sheriffs. In its opinion, the plurality traced the history of the practice of political patronage, and emphasized the pressure that practice exerts on a public employee's freedoms of belief and association. The plurality held that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, but carved an exception for policymaking positions to ensure that "representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration * * * * Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." 427 U.S. at 367. Noting that "no clear line can be drawn between policymaking and nonpolicymaking positions," the plurality opinion

stressed that the nature of an employee's responsibilities is the critical factor in categorizing that employee. Id. The plurality stated that an employee with responsibilities that are not well defined or are of broad scope, or one who acts as an adviser or formulates plans for implementing broad goals is more likely to function as a policymaker. Id. at 367-68. In his concurring opinion, Justice Stewart framed the plurality's holding as prohibiting the discharge or threat of discharge of a "nonpolicymaking, nonconfidential government employee * * * * from a job that he is satisfactorily performing upon the sole ground of his political beliefs." Id. at 375.

Four years after the Elrod decision, the Supreme Court clarified the

exception to the prohibition of patronage dismissals in Branti v. Finkel, 445 U.S. 507 (1980). In Branti, the Court held that the dismissal of two assistant public defenders was not permissible under the First and Fourteenth Amendments because any policymaking occurring in the public defender's office would be tied to the representation of individual clients, and not to partisan political interests. Likewise, although an assistant public defender would obtain access to confidential information in the course of his representation of various clients, that information would not relate to partisan political concerns either. The Court stated that "the ultimate inquiry is not whether the label `policymaker' or `confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that

party affiliation is an appropriate requirement for the effective performance of the public office involved."[2] 445 U.S. at 518.

In the instant case the district court submitted to the jury the question whether the SLA II position fit the exception to the prohibition against

---

[2] Although both Elrod and Branti dealt with terminated employees whose political party differed from that of the hiring authority who terminated them, subsequent court of appeals decisions have held that the prohibition of patronage dismissals voiced in Elrod and Branti applies as well when the discharged employee and the hiring authority are from two different factions of the same party. See, e.g. Barnes v. Bosley, 745 F.2d 501, 506 n.2 (8th Cir. 1984), cert. denied, 105 S.Ct. 2022 (1985); McBee v. Jim Hogg Co., 703 F.2d 834, 838 n.1 (5th Cir. 1983). Thus Elrod and Branti control this case even though Bauer and Bosley are from two separate factions of the Democratic Party in St. Louis.

patronage dismissals. By returning its

verdict for plaintiff Bauer, the jury necessarily found that political affiliation was not an appropriate requirement for the SLA II position. We believe, however, that on the facts before us the SLA II position is excepted from the rule of Elrod-Branti as a matter of law. We note at the outset that not only do the parties dispute whether the

---

[3] Specifically, the jury instructions on the issue of the appropriateness of political affiliation to Bauer's position were as follows:

Instruction No. 14: In determining whether political affiliation is an appropriate requirement for a position, you are to consider: the employee's responsibilities and authority, primary duties, level of position, and capacity to formulate policymaking for confidential relationship or [sic] whether the position has a direct or indirect, meaningful input into decision making for the employer.

Instruction No. 15: If you believe

appropriateness of political affiliation to a particular position is a question of law or fact, but courts themselves have disagreed whether the determination is one of law or fact. See Horton v. Taylor, 767 F.2d 471, 478 (8th Cir. 1985) and cases cited therein. Even within this circuit a difference of opinion exists as to the nature of the question. Compare Horton, id. and Hartley v. Fine, 780 F.2d 1383, 1385, 1388 (8th Cir. 1985) (in jury trial, district court determined that plaintiff employee's position was nonpolicymaking) with Barnes v. Bosley, 745 F.2d 501, 508-09 (8th Cir. 1984), cert. denied, 105 S.Ct. 2022 (1985)

---

that political affiliation is an appropriate requirement for the position of Legal Advisor or Legal Staff Assistant II, then your verdict must be for the defendants.

(in bench trial, district court's finding that political affiliation was not an appropriate requirement for plaintiffs' positions was not clearly erroneous) and Gibbons v. Bond, 668 F.2d 967, 968-69 (8th Cir. 1982) (same). We think that just as the nonpolicymaking, nonconfidential nature of the plaintiff road-graders' jobs was clear from the record in Horton, 767 F.2d at 478, so is the confidential nature of the SLA II position evident from the record before us. Thus the district court, on the facts of this case, erred in submitting to the jury the question of the appropriateness of party affiliation as a ground for dismissal.

We base our holding in large part on the testimony adduced at trial from Bauer's predecessor and successors in the SLA II position. Uniformly, Bauer's

predecessor, Julian Bush, and Bauer's successors, Jimmie Edwards and Clyde Cahill, Jr., testified that while they served in the SLA II office they shared an attorney-client relationship with the Circuit Clerk. Similarly, both Bosley and Thomas Connelly, a former candidate for Circuit Clerk, stated that the relationship between the SLA II and the Clerk was properly that of attorney-client. This same group of witnesses, Bush, Edwards, Cahill, Bosley, and Connelly, testified that the SLA II was appointed by the Circuit Clerk only, in contrast to Bauer's testimony that both Judge Corcoran and Clerk Roddy gave him his job. Bush and Cahill both stated that while serving in the SLA II position they were responsible for advising the Circuit Clerk as to his official duties. Even Bauer admitted that he advised the

Clerk as to compliance with statutes governing office procedures, and explained to Bosley his role as Clerk at the circuit judges en banc meeting. Evidence at trial also indicated Bauer made recommendations to the Clerk on personnel matters; Edwards and Cahill testified that they too advised the Circuit Clerk on personnel questions when each of them served as SLA II. Edwards and Cahill further stated that while occupying the SLA II office they represented the Circuit Clerk in various matters, including contract negotiations, and judicial and administrative proceedings.

Based on the record testimony, then, it seems clear to us that the SLA II position is exactly the sort of position for which political affiliation is an appropriate requirement for

effective performance. The SLA II is the only position in the Circuit Clerk's Office that must be filled by an attorney licensed by the State of Missouri. Because the responsibilities of the SLA II encompass the rendering of legal advice to, and legal representation of the Circuit Clerk, the Clerk is entitled to appoint to the position an attorney in whom he can repose his trust and confidence. To require a newly elected Circuit Clerk to retain his predecessor's appointee to the SLA II position would be to ignore the aspects of confidentiality and loyalty attendant to the attorney-client relationship. Unlike the assistant public defender positions at issue in Branti, the attorney-client relationship that the SLA II enters here is not with outside clients, but with the Circuit Clerk himself, who is elected to

his position and entitled to execute his policies within the strictures of his office. As such, should the Circuit Clerk and the SLA II be at odds politically or personally, it can easily be contemplated that the efficient running of the Clerk's Office would be adversely affected. An attorney should not force his services upon any client or individual in any situation that encompasses an attorney-client relationship or a relationship that commands mutual confidence, fidelity, and compatibility.

The arguments advanced by Bauer as to why political affiliation is not an appropriate requirement for the SLA II position do not change our conclusion. Bauer states that the Missouri legislature provided for the possibility that the Circuit Clerk of the City of St.

Louis might need counsel by providing in Mo. Rev. Stat. s 483.260 (1978) that the St. Louis Circuit Clerk "may employ an attorney or attorneys to aid and advise him in the discharge of his duties, to render independent legal advice and services and to represent him in court." This statute, however, limits the compensation that may be paid to such independent counsel to $5,000 a year. This low figure, which would buy no more than two weeks of representation in the current legal market, indicates that this provision is to cover any special needs that might arise in the Circuit Clerk's Office, such as litigation, and not the day to day matters handled by the SLA II. Bauer also argues that Mo. Rev. Stat. s 476.290 (1978) negates the possibility that the SLA II shares an attorney-client relationship with the Circuit Clerk.

Section 476.290 provides in pertinent part:

> [N]or shall any clerk or deputy clerk, while he continues to act as such, plead, practice or act as counselor or attorney in any court within the county for which he is such clerk or deputy clerk, in his own name or in the name of any other person, under any pretense whatever.

Assuming arguendo that the SLA II is a deputy clerk, we do not think this statute requires that the SLA II refrain from acting as an attorney or giving legal advice; at most the statute precludes the SLA II from practicing or appearing in court in the City of St. Louis.

Bauer next asserts that the job description of the SLA II position does not support the defendants' claim that an attorney-client relationship existed between the SLA II and the Circuit Clerk,

because that document details several duties that the SLA II is to perform for and under the supervision of the judges of the circuit court. The testimony at trial indicated, however, that the job description in question contained only general guidelines for all SLA II positions, or lawyers working for the court, in the entire state judiciary. The document on its face states that "Any one position may not include all of the duties listed, nor do the examples cover all the duties which may be performed." Thus the "Examples of Work Performed" listed on the job description are neither dispositive nor especially pertinent to the issue of the appropriateness of political affiliation to the SLA II position.

As for Bauer's further contention that no attorney-client relationship

existed in fact between Bauer and Bosley, this argument fails to comprehend that the proper focus is on the "powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office." Tomczak v. City of Chicago, 765 F.2d 633, 640 (7th Cir.), cert. denied, 106 S.Ct. 313 (1985). In Tomczak the Seventh Circuit went on to state: "Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that render his political affiliation an appropriate prerequisite for effective performance." Tomczak, 765 F.2d at 641. See also Mummau v. Ranck, 687 F.2d 9, 10 (3rd Cir. 1982); Ness v. Marshall, 660 F.2d 517,

521-22 (3rd Cir.1981). It is clear from the testimony of Bush, Edwards, and Cahill that functions creating an attorney-client relationship--endering legal advice, advising as to legal policy, and providing legal representation at administrative hearings--normally attend the SLA II position. Thus the SLA II position is exempt from the prohibition against political terminations, regardless of whether Bauer himself performed such functions or entered such a relationship with Bosley. Further, that Bauer, or any other SLA II in the Office of the Circuit Clerk in the City of St. Louis, might have performed some work for the circuit court judges in addition to his duties to the Circuit Clerk does not warrant a change in our conclusion that political affiliation is an appropriate

requirement for the effective performance of the position.[4] See Ness, 660 F.2d at 522.

Finally, Bauer asserts that Bosley "testified without qualification that he did not consider political affiliation to be an appropriate requirement" for the SLA II position, and therefore cannot now challenge a court order that accepts that testimony as true. The testimony given

---

[4] Clyde Cahill, Jr. testified that any interaction he had with the circuit judges was on behalf of Bosley. Both Cahill and Edwards stated that they worked 100% for the Circuit Clerk.

by Bosley to which Bauer cites[5] reads as follows:

> Q. [Plaintiff's counsel]: Do you consider, Mr. Bosley, that political affiliation is an appropriate requirement for the position of legal staff assistant II in the clerk's office?
> A. [Bosley]: Do I consider political affiliation?
> Q. Yes.
> A. No.

Bosley later testified on direct that he thought he was being asked whether he considered political affiliation in filling jobs, not whether he considered political affiliation an appropriate

---

[5] Bosley's testimony cited by Bauer was read into the record from a pretrial deposition taken of Bosley by Bauer's counsel.

requirement for the SLA II position in his office. Bosley then testified that he did consider political affiliation an appropriate requirement for the position of legal advisor. That Bosley testified, in effect, that he did not consider political affiliation in filling the SLA II position but that political affiliation would be an appropriate requirement for the position is not inconsistent. The inquiry here is not whether political affiliation is a necessary requirement for the effective performance of the SLA II position, but whether it is an appropriate requirement. See Ness, 660 F.2d at 522. And under the facts of this case, we hold that political affiliation is an appropriate requirement for the effective performance of the SLA II position.

Because of our conclusion as to

the appropriateness of political affiliation as a grounds for dismissal from the SLA II position, we need not address whether Bauer's discharge was in fact politically motivated, or the issue of qualified immunity.

III. CONCLUSION

The district court's grant of judgment notwithstanding the verdict as to the damage award is affirmed, while the order declaring that Bauer's Constitutional rights had been violated and reinstating Bauer to his former position is reversed.

HEANEY, Circuit Judge, dissenting.

The jury in this case decided that a motivating factor in Thomas Bauer's dismissal was the political work that Bauer performed in the campaign of

Circuit Clerk Freeman Bosley's opponent, Joseph Roddy.

The majority decides that, in spite of this finding, Bosley's dismissal of Bauer is not prohibited by the Supreme Court's decisions in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). I disagree.

The presence of an attorney-client relationship does not automatically qualify the SLA II position as a policymaking or confidential one under Elrod and Branti. Branti itself involved an attorney-client relationship. There, two assistant public defenders were discharged by their superior for political reasons. 445 U.S. at 504. The discharged assistant public defenders had access to confidential information, but the Court held that that information had no bearing on partisan political

concerns, and thus they remained under the protection of the first amendment. Id. at 519-20.

Similarly, in this case, partisan concerns have little to do with the proper performance of the SLA II's duties. The majority attaches great importance to the "confidentiality and loyalty" attendant to the attorney-client relationship between the SLA II and the Clerk. See supra p.11. But, as Branti has established, the requirement for loyalty in a position is not in itself sufficient to permit patronage firings. There must be a legitimate requirement for political loyalty.[1] Does the

---

[1] In Meeks v. Grimes, 779 F.2d 417, 421 (7th Cir. 1985), a case involving bailiffs with access to confidential information, the Court stated the

position of SLA II appropriately and inherently require a politically loyal person?

One clearly cannot answer in the affirmative after examining the SLA II job description promulgated under the authority of the Missouri Supreme Court.[2]

---

following about requirements for political loyalty:

Defendants stress that any access to court records when coupled with political animosity creates a serious threat of politically motivated breaches of confidentiality of the judicial process. This argument, while relevant, proves too much. These bailiffs are duty-bound to protect the sanctity of the court, and, while political affiliation may be an acceptable priority for loyalty, trust, and maybe even efficiency, it would cast the net of the Elrod exception too wide to allow political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts. [Emphasis supplied.]

2DEFINITION OF WORK

This is complex and varied professional legal work in providing

The duties described there are simply technical and legal.

legal services and technical support to judges, commissioners, circuit clerks or other administrators.

Work involves the performance of a variety of legal, technical and lead person duties in facilitating the smooth operation of a large circuit court or division thereof. Work differs from the Legal Staff Assistant I in that incumbents are able to address the more complex legal issues and are required to operate independently with a minimum of supervision. In addition, employees in this class may be required to act as a lead person over subordinate legal staff or other court clerical personnel as a duty which is incidental to the primary task of providing legal services. Work is performed under the general supervision of a judge, commissioner, circuit clerk or administrator and is reviewed through conferences and written reports.

EXAMPLES OF WORK PERFORMED (Any one position may not include all of the duties listed, nor do the examples cover all the duties which may be performed.)

Acts as a lead person over subordinate legal staff or other clerical or paralegal personnel as required; trains personnel as necessary.

Reviews, analyzes, studies, searches and annotates laws, court decisions, documents, opinions, briefs and related

In the "Definition of Work," it is stated that the SLA II provides "legal services and technical support to judges, commissioners, circuit clerks or other

---

legal authorities to process suits, trials, hearings, appeals and other litigated matters; may appear at court hearings.

Reads and digests opinions, brief, motions, and documents and extracts excerpts pertinent to points of law and fact.

Prepares briefs, legal memoranda and statement of issues involved, including appropriate written or oral suggestions or recommendations to the judge; prepares appropriate orders, findings of fact and conclusions of law for judge.

Compiles references on laws and decisions necessary for legal determinations.

Prepares complex service orders such as immediate restraining orders, show cause and temporry [sic] injunction; reviews and prepares forms and manuals.

Reads petitions, checks for accuracy, checks facts, allegations and legality; approves the more routine petitions; sends more complex petitions with recommendations to judge for review and approval; interviews guardian and ward relative to estate matters.

administrators." (Emphasis supplied.) The description goes on to state that "[w]ork differs from the Legal Staff Assistant I in that incumbents are able

---

Audits and approves inheritance tax reports and inventories of assets: checks assets, deductions and property distributions; determines adequacy of surety bonds.

Confers with judge concerning legal questions, construction of documents and the granting of orders; may grant or deny continuances in routine matters.

Confers with attorney concerning the adquacy [sic] of petitions or other matters before the court; provides general information to the public.

Performs related work as required.

DESIRABLE EDUCATION AND EXPERIENCE

Graduation from an accredited law school and experience in the practice of law; or any equivalent combination of education and experience which provides the following knowledge, abilities and skills:

Considerable knowledge of one or more phases of law as required by the assigned duties.

Considerable knowledge of general law, State laws, established precedent and

to address the more complex legal issues and are required to operate independently with a minimum of supervision." (Emphasis supplied.) Nowhere does the job description even suggest that the SLA II should act as the clerk's "personal attorney" or political advisor.

---

sources of legal reference.

Considerable knowledge of court procedures and rules of evidence.

Ability to apply legal principles and specialized knowledge to individual cases and problems.

Ability to analyze, appraise and organize facts, evidence, and precedents concerned in assigned cases and to prepare written opinions.

Ability to train and supervise subordinates if required by the position.

ability to establish and maintain effective working relationships with others.

NECESSARY SPECIAL REQUIREMENTS

Possession of a Certificate of Admission to the Bar of the State of Missouri.

In the portion of the job description entitled "Examples of Work Performed," a number of duties of the SLA II are mentioned. These duties include: supervising subordinate legal staff; training personnel; reviewing and analyzing court decisions; processing suits; reading digests and excerpting pertinent points of law; preparing briefs and memoranda for judges; preparing legal orders; reviewing petitions and making recommendations thereon to judges; auditing and approving inheritance tax reports and inventories of assets; conferring with judges concerning legal matters; conferring with attorneys about matters before the court; and performing related work as required. Nowhere in the examples mentioned does SLA II appear to assume a role as the clerk's speech

writer, personal aid, or personal attorney. Instead, the examples listed are of a technical and administrative nature with the services intended to be provided to judges and clerk of court personnel alike.

Undoubtedly, in performing these duties, the SLA II must be loyal to the judges, commissioners, circuit clerks, or other administrators for whom he or she works. But this loyalty could not properly be political because many of these persons may properly be of different political persuasions from each other.

The testimony of witnesses provides no more conclusive evidence of the necessity of the political loyalty of the SLA II to the clerk. That Bosley and a group of other witnesses--Julian Bush,

Bauer's predecessor, and Jimmie Edwards and Clyde Cahill, Jr., Bauer's successors--variously testified that the Circuit Clerk appointed the SLA II, that the SLA II was responsible for advising the Clerk as to his or her official duties, and that the SLA II advised the clerk on personnel questions does not convert the SLA II position into one requiring political loyalty. These tasks appear to be very similar to the ones described in the job description, which were supposed to be available to other court personnel, such as judges.

The legal representation which the SLA II provided the clerk also seems apolitical: Bosley's one-time SLA II Jimmie Edwards' drafting of a IBM computer contract, defending the clerk in prisoners' suits, and making appearances before administrative tribunals. The

representation in these cases seems to be of the Clerk of Court office in general, not just Freeman Bosley personally. Edwards conceded as much when he stated, "I also protected approximately 210 employees whenever they encountered any legal challenges from attorneys or the general public."

Finally, and most convincingly, both Bosley and Edwards, directly admitted to the apolitical nature of the SLA II job. Bosley stated that he did not consider political affiliation in hiring his SLA IIs. Bosley only attempted later in his testimony to retract this statement by stating that he himself did not consider political affiliation in hiring and firing but that another clerk might properly do so. Edwards, however, testified that it would

never be appropriate to consider the political allegiances of the SLA II in determining competency for the position:

> Q. Hypothetically, if a person was a legal advisor and he was in a different political party than the clerk, could he harm or hamper the clerk?
>
> A. I don't think that that really has anything to do with it. My job was to handle the legal questions and the legal questions are very, very clear, the interpretation of the laws of the State of Missouri. I don't think that politics has anything to do with it.

* * * *

> Q. If I understand your earlier testimony correctly, you think that particular party affiliation really doesn't matter to the appointment process to the legal advisor. That he is getting somebody who is competent to do the job. Is that right?
>
> A. Definitely true.

Not only do Bosley's and Edwards' testimony indicate that the appropriate requirements for the SLA II position are

nonpartisan in nature, the majority fails to point to any testimony or documentary evidence, other than Bosley's modification of his statement, suggesting directly that partisan allegiance constitutes an appropriate requirement for the job of SLA II.

Thus, from the testimony of mostly partial witnesses, without any support from Missouri statutory law or administrative rules, the majority constructs an Elrod-Branti confidential relationship between the SLA II and the Clerk of Court. In doing so, however, the majority ignores the central distinction in Elrod and Branti between mere loyalty and political loyalty. The evidence in this case only shows that the SLA II position legitimately requires a loyal person; it falls far short of showing that the position requires a

politically loyal person.

The outcome which I believe is correct under Elrod and Branti may seem unfair to Bosley in that he would be the first Circuit Clerk affected by Elrod and Branti, particularly because Bauer himself certainly exercised powers not inherent in the office of SLA II when he actively campaigned for the reelection of Circuit Clerk Roddy. The Supreme Court, however, did not exempt employees previously hired for patronage reasons from its general rule. The Supreme Court's ruling in Elrod protected from the time it was decided all employees in positions for which political affiliation is not an appropriate job requirement. Bauer held such a position after Elrod and Branti had been decided and thus cannot be excepted from its rule.

QUALIFIED IMMUNITY

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court held that government officials performing discretionary functions "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id.. at 818 (citations omitted). This defense of qualified immunity is an affirmative one which therefore must be pleaded.[3] Id. at 815. Creamer v. Porter, 754 F.2d 1311, 1317 (8th Cir. 1985) (citations omitted).

---

[3] In this case there is some question whether the defendant Bosley raised the defense at trial. Compare Brown v. St. Louis Dept., et al., 691 F.2d 393, 396 (8th Cir. 1982), and Johnson v. Rodgers, 621 F.2d 300 (8th Cir. 1980). The issue of whether Bosley

Elrod and Branti had been decided before Bosley dismissed Bauer in January of 1984. These decisions certainly established the constitutional right that government employees could not be terminated for patronage reasons from positions for which political affiliation was not an appropriate requirement. Bosley contends that the general establishment of the right is not sufficient but that it must be clearly established to be a right the plaintiff Bauer held. Bosley submits that it was not clearly established that Bauer did not fit within the Elrod-Branti exception.

---

adequately raised the defense at trial, however, does not have to be resolved. Even assuming it was adequately raised, the defendant would not be protected by the qualified immunity doctrine as stated in Harlow.

There will always be some uncertainty whether it is clearly established that a particular individual possesses a given constitutional right. As the Supreme Court recently stated in Mitchell v. Forsythe, U.S. , 53 U.S.L.W. 4798 (June 19, 1986), regarding the prohibition of wiretaps without a warrant and whether such law was clearly established:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

Id. at 4804 n.12.

In Mitchell, U.S. , 53 U.S.L.W. 4803-04, the general

constitutional prohibition against wiretaps without probable cause had not been clearly established by the Supreme Court before the action in question took place. Here, Elrod and Branti had both been decided before Bosley dismissed Bauer.

Clearly some question still remained after Elrod and Branti as to who was to be excepted from the general rule. But as the Mitchell case clarifies, some question is not sufficient. In every valid suit for violation of constitutional rights there will remain some question as to the legitimacy of the claim. Harlow certainly was not intended to discourage such valid suits, which it would effectively do if interpreted this way, by immunizing public officials from liability in them.

Harlow especially should not be interpreted to free public officials who deliberately fire employees before serious questions of the constitutionality of such actions can be resolved. In this case, Bosley fired Bauer in the face of a proposed order of the St. Louis Circuit Court sitting en banc prohibiting such action. Such behavior by a public official should not be protected.

I therefore believe that the jury's award of $58,000 in actual damages and $6,000 in punitive damages to Bauer should be reinstated. The award of $6,000 in punitive damages was based on the jury's finding that Bosley believed he was violating Bauer's constitutional rights when he terminated him. Evidence was submitted that Bosley knew of the

fired Bosley and also that Bosley knew he could not constitutionally fire Bauer for political reasons but did so in spite of such law. The jury's verdict therefore is supported by the evidence and should not be overturned.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 85-2186/2187-EM

Thomas E. Bauer,	*
	*
Appellee,	*
	*
vs.	*
	*
Freeman (Teek) Bosley, Jr., Clerk, Circuit Court, City of St. Louis, et al.,	*
	*
Appellants.	*

Appeals from the United States District Court for the Eastern District of Missouri

Petition for rehearing en banc filed by appellee/cross-appellant, Thomas E. Bauer, has been considered by the Court and is denied.

Judges Heaney and McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

December 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THOMAS E. BAUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.83-2754C(3)
	)	
FREEMAN BOSLEY, JR., et al.,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's rights under the United States Constitution have been violated by the defendants.

IT IS HEREBY FURTHER ORDERED that defendants shall reinstate plaintiff to his position as legal advisor in the Office of the Circuit Clerk.

IT IS HEREBY FURTHER ORDERED that defendants' motion for judgment

notwithstanding the verdict be and the same is granted in part and denied in part.

IT IS HEREBY FURTHER ORDERED that defendants' motion for a new trial be and the same is denied.

IT IS HEREBY FURTHER ORDERED that plaintiff shall supplement his request for attorney's fees and costs within fifteen days of the date of this order.

Dated this 28th day of August, 1985.

William Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THOMAS E. BAUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.83-2754C(3)
	)	
	)	
FREEMAN BOSLEY, JR., et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court on various post-trial motions.

The Court believes that defendants' suggestion that they are entitled to some form of sovereign immunity from compensatory damages in this cause merits careful consideration. The issue was raised by the parties in pretrial and post-trial motions, as well as during the instruction conference. Neither party has adequately addressed this issue throughout these proceedings.

Defendants are sued in their individual and official capacities. It is well established that defendants Bosley and Carter are immune from a recovery of damages in their official capacities because a recovery of damages from the circuit clerk and deputy clerk of a state court would effectively come from the state treasury. Scheurer v. Rhodes, 416 U.S. 232, 238 (1974) (the Eleventh Amendment bars suits against the state not only when it is named as a party but also where the state is a party in fact); Edelman v. Jordan, 415 U.S. 651, 664 (1974), reh. denied, 416 U.S. 1000 (the Eleventh Amendment will bar a suit by private parties seeking to impose a liability which must be paid from public funds from the state treasury, even though individual officers of the state are the nominal defendants). However,

are the nominal defendants). However, this immunity from damages available to the state in a s 1983 action does not preclude an award of prospective injunctive relief or attorneys' fees. Pulliam v. Allen, 404 S.Ct. 1970 (1984).

An issue before this Court is whether defendants may be liable in their individual capacities for damages suffered by plaintiff. It is clear that the answer is yes--state officials acting under the color of state law, who deprive a citizen of his constitutional rights, will be liable for the damage they cause under the appropriate circumstances. Scheuer v. Rhodes, supra at 238 ("when a state officer acts under a state law in a manner violative of the Federal Constitution, he `comes into conflict with the superior authority of that Constitution, and he is in that case

stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" Id. (emphasis in original.))

The remaining question before this Court, therefore, is to what extent and under what circumstances the defendants, as individuals, may be immune from damages for what the jury in this cause has determined to be a violation of plaintiff's civil rights.

It is established that state officials, such as the defendants, enjoy a qualified immunity from personal liability for damages. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); Buller v. Beuchler, 706 F.2d 844 (8th Cir. 1983). For a period of time it was held that state officials waived this qualified or "good faith" immunity from personal liability only

when it was determined they had acted maliciously or in bad faith. See, e.g., Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 567 F.2d 1381 (8th Cir. 1977). In the case at hand, the jury, by its award of punitive damages, made a finding of bad faith as to defendant Bosley. See Jury Instruction No. 16A1-2. At the present time, however, the test for deciding whether the defendants waived their qualified immunity involves an objective rather than subjective determination. Davis v. Scherer, 104 S.Ct. 3012, 3018-19, reh. denied, 105 S.Ct. 26 (1984). What defendants Bosley and Carter were actually thinking, or any malice they may have harbored for the plaintiff when they terminated his employment, is irrelevant. The appropriate standard to be used in deciding whether "`an official may

depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." No other "circumstances" are relevant to the issue of qualified immunity.'" Tubbesing v. Arnold, 742 F.2d 401, 405 (8th Cir. 1984), quoting Davis v. Scherer, supra at 3018-19.

In this case, it cannot be said that the position of legal advisor held by plaintiff was clearly established by law to be a job for which political affiliation was not a legitimate requirement. In fact, the constitutional protection afforded plaintiff in the legal advisor's position was hotly contested and not clearly established by law when the defendants took the action complained of. It is also helpful to note that in the other litigation arising

out of defendants' conduct involving other alleged political termination (arguably more clear-cut constitutional violations than the one at hand), compensatory damages were not available to the prevailing plaintiff employees. See, e.g., Barnes v. Bosley, 568 F. Supp. 1406 (E.D. Mo. 1983), rev'd in part, modified in part, and aff'd in part, Barnes v. Bosley, 745 F.2d 501 (8th Cir. 1984), cert. denied, 105 S.Ct. 2022 (1985).

For the reasons discussed above, the Court finds that defendants are entitled to qualified immunity, and plaintiff may not recover compensatory or related punitive damages from either defendant. Accordingly, it will be ordered that defendants' motion for judgment notwithstanding the verdict will be granted as to the jury's award of damages

in the amount of $58,000.00 and punitive damages in the amount of $6,000.00, and denied as to the remainder.

In view of the jury's finding that the defendants violated plaintiff's First Amendment rights, the Court finds appropriate an award of declaratory and injunctive relief. See Barnes v. Bosley, supra, 568 F.Supp. 1406; Barnes v. Bosley, supra, 745 F.2d 501. Accordingly, the Court will enter judgment declaring the rights of the plaintiff under the United States Constitution have been violated by defendants and order that plaintiff be reinstated to his position as legal advisor. While plaintiff is not entitled to compensatory damages in the form of backpay, he is otherwise restored to all the rights and benefits thereto appertaining as though he had not been

terminated.

Plaintiff moves the Court to award him attorney's fees in the amount of $11,362.10 and expenses in the sum of $831.68. Plaintiff is a prevailing party within the meaning of 42 U.S.C. s 1988 in that the jury rendered a verdict in favor of plaintiff and against defendants. Accordingly, plaintiff is entitled to a reasonable award of fees. The expenses claimed by plaintiff appear to include expenses already awarded to plaintiff as costs taxed by the Clerk of the Court on June 14, 1985, although in their exceptions, defendants do not directly address this problem. The remaining expenses are not explained or distinguished from those taxed as costs. In addition, plaintiff submits a computer printout in support of his attorney's fees which does not set forth the rates

or fees charged per hour, or the qualifications of the persons charging for the items listed, or whether or not a fee agreement exists between plaintiff and his counsel. Accordingly, plaintiff will be granted fifteen days from this date to supplement his request for fees and expenses in more detail as to the existence or nonexistence of a fee agreement between plaintiff and his counsel, and the hourly rates charged by plaintiff's counsel, or plaintiff's request for fees and expenses may be denied.

Dated this 28th day of August, 1985

William Hungate
UNITED STATES DISTRICT JUDGE